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THE MORAL DUTY TO AID OTHERS AS A BASIS OF TORT LIABILITY.

I.

An interesting problem is presented in several recent cases. How far, if at all, is one man bound, being able to do so without serious inconvenience to himself, to go out of his way to care for those injured without any fault of his?¹ How far is he bound to extricate another from a perilous position? How far must he act, if at all, to mitigate the consequences of an injury, where he is personally free from all fault? It is curious to find that many text writers flatly assert the existence of such a duty, at least in those cases where the harm or peril has been caused by some act of the defendant, even though that act be legally innocent.² This doctrine is so opposed to the normal attitude of common law, and to the statements thereof, generally it is true by

¹ *Shaw v. R. R.*, 114 N. W., 85 (Minn., 1908); *Raasch v. Elite Laundry Co.*, 98 Minn.; *Whitesides v. R. R.*, 128 N. C., 229; *Cappier v. R. R.*, 66 Kansas, 649, 69 L. R. A., 513, and *Prosper v. Suburban Railway Co.*, 67 Atl. R., 552 (R. I., June 27, 1907).

² Beach on Contributory Negligence, Sec. 215; Thompson on Negligence, vol. ii., sec. 1744.

way of dictum, of so many eminent judges,³ that it is necessary to examine the decided cases to see whether they afford any authority in favor, *first*, of a general duty to act as a good Samaritan; or, *second*, whether innocent but injurious action entails upon the actor a duty to remove as far as possible the injury which he has caused; or, *third*, whether again, there may not be other definite classes of circumstances or relations out of which may arise a duty of this sort peculiar to themselves.

There is one class of cases⁴ often cited and which may at first glance seem to support a duty of active care and protection based upon the helpless peril of him who claims it.

³ Among others the statement of Willes, J., in *Gautret v. Egerton*, L. R., 2 C. P. 371: "No action will lie against a spiteful man, who seeing another running into a position of danger merely omits the warning." Also Mr. Justice Field in *U. S. v. Knowles*, 4 Sawy., 517: "It is undoubtedly the moral duty of every person to extend to others assistance when in danger." "And if such efforts should be omitted by any one when they can be made, without imperiling his own life, he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society." So, Carpenter, C. J., says in *Buch v. Amory Co.*, 69 N. H., 257: "With purely moral obligations, the law does not deal. For example, the priest and the Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself. And the instincts of humanity require him to do so. If he does not, he may perhaps justly be styled a ruthless savage and a moral monster, but he is not liable in damages for the child's injury or indictable under the statute for its death.

⁴ The most usual cases of this sort are where after a trespasser is discovered in a helpless condition upon the tracks of a railway, an engineer of one of its trains fails to take care to avoid running over him. *Tanner v. R. R.*, 60 Ala., 621; *Spearen v. R. R.*, 47 Pa., 300; *R. R. v. Kelly*, 35 C. C. A., 571. Of this sort is the case of *Pannell v. R. R.*, 97 Ala., 298, often cited in support of a duty to take steps to rescue even a trespasser from a perilous position. Here the plaintiff's intestate, being caught between two freight cars, the yard-master seeing his peril, gave no warning thereof to the engineer of the train and allowed it to be operated just as though the intestate was not in danger. Here, of course, the injury was caused by the defendant's positive misfeasance in conducting its business without any regard to the intestate's well recognized peril.

These are the cases which hold, that,—admitting that no duty exists to anticipate the presence or peril of one trespassing upon one's premises or meddling with one's personal property—due regard must be taken in the owner's operation of his business upon his premises or in the use of his property, if the trespasser's helpless peril be known, not to cause him harm.⁵ However, the duty here is not to take positive steps to remove the trespasser's peril nor to mitigate or relieve any injury which he may have sustained. They do not lay down any duty to aid or benefit the trespasser; they merely require that the owner shall not by his own action, improper because of the known peril of the plaintiff, turn the trespasser's peril into harm, or add new injury to that already received. Conceding the prevalence and justice of the rule that while no duty exists to anticipate or guard against the merely possible peril of one, who, without the owner's permission, intrudes upon his premises or meddles with his property, a duty does exist not to act after knowledge of the trespasser's presence and danger is brought home to the owner, in a way to ripen it into injury, no support can be derived from it for the contention that the law has recognized as a legal duty the moral, ethical, and humanitarian obligation to aid the unfortunate.

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

⁵ The same conception appears to lie at the bottom of the so-called doctrine of Last Clear Chance, applicable to cases where the plaintiff has contributed by his conduct to his own injury. In such case the defendant, though guilty of wrongdoing, is relieved from liability, unless he knowing, or being in duty bound to know, of the plaintiff's helpless peril or injury, fails to take care that he may not add to it by his subsequent conduct. Some of the cases cited in support of the duty to act for the protection of the helpless are merely instances of the application of this doctrine. Such was the case often cited, *Weitzman v. Nassau R. R.*, 33 App. Div. N. Y., 585; 53 N. Y. Supp., 905.

This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought. Misfeasance differs from non-feasance in two respects; in the character of the conduct complained of, and second, in the nature of the detriment suffered in consequence thereof. The difference between the nature of the alleged misconduct is in theory obvious, but in practice it is not always easy to say whether an alleged misconduct is active or passive. There is a borderland in which the act is of a mixed character, partaking of the nature of both.⁶

The difference between the results of non-feasance and misfeasance while quite as fundamental, is much less obvious. The final physical injury to the plaintiff may be the same whether defendant's alleged misconduct is an act of violence or a failure to protect him from the violence of others. But, there is a point intermediate between the plaintiff's actual harm, and the defendant's misconduct, where its consequences are substantially different. In the case of active misfeasance the victim is positively worse off as a result of the wrongful act. In cases of passive inaction plaintiff is in reality no worse off at all. His situation is unchanged; he is merely deprived of a protection which, had it been afforded him, would have benefited him. In the one case the defendant, by interfering with plaintiff or his affairs, has brought a new harm upon him, and created a minus quantity, a positive loss. In the other, by failing to interfere in the plaintiff's affairs, the defendant has left him just as he was before; no better

⁶ So, while to use an article known to be defective is palpably misfeasance, and while a mere failure to provide protection for those who by one's bare permission use one's premises is plainly passive non-feasance, the use of a chattel for a particular purpose without having first ascertained whether it is fit for such purpose is a compound of both. There is both action, *i. e.*, the use of the chattel and non-feasance, the failure to perform the positive duty of inspecting it to ascertain if it be defective, and then repairing it so as to secure the safety of those apt to be affected thereby. Still, the final cause of whatever injury is sustained being the use of the chattel, the tendency is to consider that the whole constitutes an act of misfeasance.

off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury nor created any new injurious situation. There is here a loss only in the sense of an absence of a plus quantity. It is this latter difference which in fact lies at the root of the marked difference in liability at common law for the consequences of misfeasance and non-feasance.

It may be said with some confidence that the primary conception of the common law was that which regarded the individual as competent to protect himself if not interfered with from without.⁷ So, while there is a general liability recognized in common law courts for the natural consequences of all actions whose probable result will be a positive injury to others, duties of positive action for the benefit of others are not general to the common law, but exceptional and abnormal, requiring some other basis than the mere probability that such action is necessary to protect others from an injurious situation not caused by any antecedent misconduct of the defendant himself.

Now, while the duty to take active care for others is not general in the common law, there are undoubtedly many relations to which duties of this nature of varying stringency do attach. It is essential to examine the true nature of such duties and consider their proper place, if any, in the law of tort, to ascertain the various relations to which they attach, and the attributes which such relations possess in common, and so, if possible, discover their underlying basis.

It is more than doubtful whether the breach of an obligation to take positive beneficial action should ever have been regarded as a true tort, so marked are the points of diversions between it and active misconducts. It would perhaps have been better to have confined use of the term tort to misconducts falling within the early punitive, semi-criminal formed writs of trespass, and to those actions on

⁷ See J. B. Ames in Harvard L. R.; F. H. Bohlen, 44 Am. Law Reg., 213-15; 20th H. L. R., 14-15; 21 H. L. R., 252.

the case which have broadened and extended the field of active misconduct by an application to new facts and conditions of the principles underlying these early actions or analogous thereto. Thus, only those positive acts which are wrongful because either intended or reasonably calculated to work harm would have been within the field of tort liability. To understand how things so dissimilar in their nature came to be classified as mere branches of the same species of liability, branches the distinction between which, while often legally enforced, is but seldom definitely formulated, certain things must be borne in mind. The common law is a thing of gradual growth, neither right nor obligation was originally conceived as existing without a remedy by some species of action to protect the one, some legal process to enforce the other. There was no broad theory or science of jurisprudence whereby rights and obligations were ascertained and where ascertained protected and enforced. Such classification as there has been in the common law has therefore been along procedural lines rather than in accordance with the substantive nature of rights and obligations.

The introduction of the writ of trespass upon the case for the first time provided a flexible remedy designed apparently merely to supplement the rigid formed writs of trespass and to extend the protection of the law to closely analogous situations. The poverty of remedial process led to the scope of this action being enormously broadened. So it came to be used to enforce every species of legally recognized duty to protect every kind of legally recognized right for which no precisely applicable writ could be found or where the appropriate writ had unduly burdensome procedural incidents. Another influence led to the free use by the courts of this new remedy. In few if any of the early formed writs was trial by jury demandable as of right. In this new action it was. The policy of the courts to encourage trials by jury to the exclusion of the earlier forms

of trials by battle, by oath and by compurgation they naturally, wherever possible, allowed this new action to be brought in lieu of the old.

In 1537, some two hundred and fifty years after the introduction of this writ, Sir Anthony Fitzherbert, in his treatise *de Natura Brevium*, the earliest authoritative abridgment of the common law gives a list of the then known actions on the case. There is no attempt at classification, but on analysis they will be found to fall into certain definite classes.

1. Cases illustrating what may be termed the primary use of the writ—the normal extension of the principles underlying the formed writs of trespass to conditions closely analogous to those for which remedy was given by such writs, but where one or another of the precise technical requirements for the operation of such writs being lacking no redress was possible under them: (a) either because the harm resulted indirectly and not directly as required in trespass *vi et armis*, or (b) the property which was destroyed had been given to the defendant and not taken from the possession of the plaintiff as required in trespass *de bonis asportatis*, or (c) the property invaded was not within the protection of the writ of trespass *quare clausum fregit*; being a term of years or a franchise.

2. The second class of case deals with the secondary use of the writ the use of it, not to extend trespass but to enforce duties and obligations having no kinship to trespass or at best only a remote analogy. These again fall into two distinct groups. A. Those which deal with certain positive duties, obligations to act affirmatively: Where the only injury sustained is the loss of the benefit which would have been derived from the proper performance of the duty; where the only right invaded is the right to the beneficial fulfillment of the obligation. These cases stand at the very opposite pole from those just discussed in which there is a mere extension of the field of punishable miscon-

duct. There is here no element of personal guilt.⁸ While the word "*negligentia*" is used, it does not signify negligence in the modern sense of the personal breach of social duty. It is the mere failure, from whatsoever cause, to fulfill an obligation only satisfied by performance that is the basis of recovery. Of these Fitzherbert gives several instances; one group, and that the earliest, are those attached by custom as an incident to the tenure of a particular estate or the incumbency of an office. A second group are those which in the modern classification of the common law are segregated into a distinct class, and treated as the very antitheses of tort liabilities. These are the modern contractual obligations; duties having as their basis the consent of those who assume them. As instances of these are given cases of warranties and the case of one who having promised to build certain wagons and having been paid the price fails to do so; the damage laid being the loss of their profitable use. To Fitzherbert these appear to differ in nothing substantial from similar positive obligations annexed by custom to the tenure of real estate. Evidently the time has not yet come when the fact that such obligations rest not on custom or some general policy of law, but upon the expressed consent of the individual, serves to mark them as radically different from all other positive obligations.

B. A class of case is given lying, it may be said, midway between the new broader conception of trespass and positive obligations. These contain the germ and root from which has developed modern social duty to act, if one acts at all, with due regard for the safety of others, and in relations consciously assumed to take precautions to provide for the safety of those with whom one is thereby associated. In Fitzherbert this idea exhibits itself in a duty of proper

⁸ So, in *Yelding v. Fay* (1596), Moore, 355, it was held that a plea of not guilty to a declaration alleging that by the custom of a certain parish the incumbent was obliged to keep a bull and a boar for the use of the parishioners, and had failed to do so, was bad; for the only offense and wrong is the non-feasance of a thing, and the defendant should allege performance, or deny the custom as raising the duty.

performance recognized as attaching to the exercise of certain trades and calling; many of them the prototypes of modern public or *quasi* public-service trades. These duties are of varying degrees of stringency. In the case of inn-keepers the obligation approaches the absolute duty of affording full protection to the guest and his property. In other cases, as that of carpenters or farriers, the duty is rather that of care in the conduct of the business to secure the safety of its patrons.

While there is nothing novel in the cases given by Fitzherbert his treatment of them is instructive as showing the attitude of legal thought at that period and the pronounced tendency to group all rights and obligations into a class determined solely by the remedy applicable thereto. The extraordinary thing is the persistence of this tendency which has led to the retention in the law of Tort of these radically differing obligations. If, however, all the varying rights and obligations being redressable by the same writ are to be considered as substantially similar in their nature it is not strange that they should be all considered to be tort—civil wrongs. Not only was the writ both in name and in many of its attributes—for one the fine payable to the crown—punitive in its nature, but its primary and most conspicuous use was in the development of the idea of civil wrong from a mere series of specific acts of violence to a broad conception requiring abstention from all acts intended or likely to work harm. Only the novelty of the idea that legal duties could be created solely by the consent of the individual without the aid of custom or policy of law; the influence of the civil law and its conception of a consensual agreement as a distinct mental entity, and the great and rapidly growing importance of contractual rights and duties in a community where business and commerce was becoming of paramount importance, served to extricate consensual obligations, themselves the last to find recognition in the common law, from classification with the other affirmative obligations as a mere branch of the law of torts, and place them in a distinct cate-

gory as contracts. No such influence was at work to extricate the residue of positive obligations, they were of small importance, of rare occurrence, and so they remain to-day a little understood and disturbing anomaly in the body of the law of tort. Were it possible to rearrange and reclassify common law liabilities and duties one might place all obligations to act in a class⁹ distinct from the obligations to refrain from injurious actions (if this indeed be the proper conception of tort liability). While such an attempt would, at this date, savor of mere theory and useless affectation, it is quite possible to segregate such positive obligations as remain after the removal of those based solely on the consent of the individuals into a distinct class of tort obligation.

This class is composed of certain distinct groups: *First*, those obligations expressly created by statute, in which the extent of the obligation depends entirely upon the intent of the legislative body which enacts the statute. *Second*, those arising out of the family relation. *Third*, those attached by custom as an incident to the tenure of real estate, or the incumbency of some office. *Fourth*, those annexed by the policy of the law as necessary incidents to a relation voluntarily assumed, normally varying in extent as the relation is gratuitous or beneficial to him on whom the obligation is laid.

⁹ Under such a classification contracts would form but one of the subdivisions into which from their varying origins such obligations would be divided. One, it is true, of an importance overshadowing all the rest and, owing to its origin in individual consent rather than custom or policy of the law, differing radically in its legal incidents from the others. Thus, it creates rights and obligations only as between the parties to it; the obligation is absolute to perform the thing promised; no principle of justice or public policy requires that duties freely and voluntarily assumed should be satisfied by anything short of full performance, while where by the policy of the law a burdensome duty has been imposed it is customarily held that all that can be asked is that care shall be taken to secure performance; one violating a contractual obligation is liable only for those consequences of it which are also probable when it is assumed. In these respects it so radically differs from other positive obligations that it may well be that even in a new classification that contractual obligations should be placed in a class by themselves.

The first class requires but little attention. There can be no question that the Sovereign, the State speaking through its legislative branch, may in the absence of any Constitutional prohibition impose such obligations as it may please upon its subjects or citizens to secure the safety of their fellows. The sole problem, and it is by no means in all cases a simple one, is to ascertain the actual intent of the Legislature as expressed in its act.

There is perhaps some doubt as to the existence in the early common law of any legal duty arising out of family relation and owed by the one member to another. Blackstone it is true asserts positively that such duties exist but he asserts it so broadly, including, as he does, duties such as that of education which have never been recognized as having legal existence, that it is doubtful whether he is not speaking of a moral and ethical duty rather than a strictly legal one. However, the great weight of modern authority is in favor of the existence of a legal duty resting upon a father or husband to provide the necessities of life to his children or wife. Whether these necessities of life include medical assistance is perhaps doubtful,¹⁰ but, admitting the existence of the duty in its broadest scope, it is predicated upon the ability of the one upon whom the duty is alleged to rest to afford the necessary protection and the dependence and helplessness of him who claims that the duty is owing to him. It is certain also that the family relation must exist; neither mere association without such relation nor a meretricious relationship creates such a duty.¹¹ Nor have the obligations incident to family relationship generally been

¹⁰ See Coleridge, C. J., in *Reg. v. Downes*, 13 Cox, C. C. 111. It is probable, however, that the doubt which he expresses is as to the nature of the duty rather than as to its existence; whether the duty is one to act *bona fide*, with good intentions, or to act as a normal man would act, or is absolute to provide medical aid if possible. The actual point in the case was whether the accused's religious scruples against giving of medicine would afford a defence where death resulted from a failure to provide medical assistance.

¹¹ *Beardsley v. State*, 113 N. W. 1128 (Mich.), 1908.

extended beyond the definite limits of furnishing necessities of life.¹²

The duties incident to the tenure of real property, either by general or special custom, and to the incumbency of office, are for the purposes of this article of small moment. An occupant of real property is bound at the least to see that care is taken in the maintenance and construction of all artificial structures and conditions upon his land, that they shall not become a source of injury, either permanently or in some particular occasion, to those who, as abutting property owners or persons using adjacent highways, are forced in the exercise of their own independent rights into contact with the property. The duty goes no further than to afford to such persons this species of protection. This lies exclusively within the power of the occupant, he having the exclusive control of the premises; as to this, the abutting owner or wayfarer, being helpless to protect himself, must and is allowed to rely upon the occupant. But there is no general entrusting of the wayfarer or of the adjacent property owners, persons or property to the land owner's care, and therefore nothing out of which a general duty of protection can arise. None the less, the duty, in so far as it goes, has all the attributes of positive obligation. It is

¹² One can hardly help suspecting that the interest of the State in seeing that it should not be unduly burdened with the support of those whose own family were able to support them has had much to do with the legal recognition of these duties. Certainly the numerous statutes passed giving to the State the right to enforce the duty of the head of a family to care for its members in relief of the burden imposed upon the State in caring for those whose families have neglected them has tended to define and possibly to restrict the extent of those duties. A larger duty of protection is enforced in the case of the *Territory v. Manton*, 7 Mont., 162; 8 Mont., 85. The defendant was convicted of the manslaughter of his wife upon the following facts: The two having got drunk together in a neighboring town, walked back to their farm, some miles away. The wife in her drunkenness fell some hundred feet from the house, and was allowed by her husband, who was also drunk, to remain in the snow all night without any effort to save her, though he could readily have done so. This case goes to the extent of recognizing that a husband at least owes a duty to take active steps to rescue his wife from a position of peril into which she had fallen, either by mischance or from her own misconduct.

one which is not satisfied by mere personal care to secure safe repair. While it is doubtful whether the obligation has preserved its early absolute character as exhibited in the cases given by Fitzherbert;¹³ whether or not it is the landlord's absolute duty to maintain his property in good repair, it is at least certain that he is bound to see that care be taken to ascertain the necessity for repair, and to have such repairs as may be necessary carefully made. And this duty is one which he cannot delegate to an independent contractor or any other person so as to escape responsibility if the requisite care is not exercised in these particulars.

Duties annexed by policy of law or custom to relations voluntarily assumed occupy the most important field and afford the most difficult problems both in theory and in practice. In some respects they closely resemble contract—while not expressly assumed, but imposed by law, they are only imposed upon and as an incident to relations voluntarily and consciously entered into; volition at some stage is essential. In consequence of this apparent kinship to contract, and of the fact that many of the relations to which they are attached are themselves the creatures of some contract, the position in the common law of these obligations has been highly uncertain. At one time the idea was prevalent and is by no means even yet extinct, that where the relation was contractual in its origin the obligations legally attached thereto arose out of a tacitly recognized implied term of the contract itself.¹⁴ Where, however, the relation existed in the absence of contract, or where though such a contract existed, the person injured was not party to it, it was evident that there must be some basis, other than that of contract, upon which the duty must rest, if it existed, as it admittedly did in such cases. The present tendency is to recognize such duties as in all cases arising out of the relation by reason of

¹³ Ante, p. 224. And in *Yelding v. Fay*, 1596 Moore, 355, *supra*, p. 224, note 8.

¹⁴The idea being in effect this: that since every man is taken to know the law, if he agrees to assume a relation, he agrees to conform to all the legal incidents thereof.

some policy of law, and as based solely upon the consent of him upon whom they are laid.

It would be impossible to set down at length all the relations to which this duty attaches. Among the more usual and important are: First, the exercise of trades, businesses, and professions.¹⁵ Second, the use for one's own purposes of real and personal property. Third, the relation of master and servant.

These duties vary as the business is public, one to whose services every one of the public is of right entitled and where safety of the whole public is dependent on the care with which it is organized and conducted; or private where the right to become its patron is a matter of private bargain and its proper conduct affects only those bargaining to receive its services.¹⁶ It reaches its highest exhibition where for reward services are tendered or the use of property offered to the public or such of them as may choose to avail themselves thereof, and where the safety of the public in person and property will be imperiled unless care is taken. As where one of the early recognized public employments, such as that of innkeeper, carrier, or the like, or one of their modern derivatives, a business carried on under a public franchise and given special rights because of its benefit to the community, is being exercised, or, where some premises is offered as a place of public resort.

¹⁵ This duty was early recognized, and while, perhaps, not fully developed in the modern cases so as to adequately carry the principles of the earlier cases to their logical conclusion under the changed conditions of modern life, it is still one which has obtained general recognition.

¹⁶ It may well be that the distinction between public and private business lies primarily in this. In a public business, one held open for the accommodation of all, where all must be equally served, every member of the public has a right to accommodation, and is entitled to presume that the business has been carefully organized and conducted with a view to his safety, whereas in purely private business there is no right on any one's part to accommodation; it is entirely a matter lying in private bargain, and the patron can make what terms he please for his own protection, just as a vendee could protect himself, and was originally required to protect himself, by appropriate warranties.

The duty on the other hand sinks to a minimum where the relation is wholly gratuitous, where some service is rendered or property allowed to be used purely as a matter of accommodation to another, and where such service is not rendered as an incident to a profession or business in general carried on for profit, and from the careless exercise of which great injury to human life is probable. In such cases good faith and fair dealing are alone required—full disclosure of the dangers actually known to exist in the property gratuitously offered for another's use.¹⁷

In the intermediate class of case where a private business is carried on for gain, or premises used for the private business purposes of the occupant, there is also a duty to use due care to secure the safety of the patron in those particulars as to which the defendant has exclusive control. So, it is the owner's duty to see that care is taken to ascertain the true nature and condition of his premises and to make the actual condition conform to the apparent condition by either repairing the defect discovered so as to make it as good as it looks, or by giving notice of the defect so as to show it to be as bad as it is.¹⁸

These duties varying as they do among themselves in extent, and differing from other positive obligations in those incidents peculiar to their particular origin, all require certain basic conditions for their existence and possess certain attributes common to all positive obligations. First, the

¹⁷ However, it is doubtful if property be even gratuitously supplied, known to contain a latent defect whether it is not the supplier's duty to see that notice of such defects is brought home to the user, and whether he could free himself from this liability by entrusting it to an independent contractor or utter stranger. Such cases would be of rare occurrence, for it is very unusual that an owner who allows persons to gratuitously use his premises entrusts the giving of notice to any one other than a servant of his own; whose neglect, of course, is legally equivalent to the personal neglect of his master.

¹⁸ And there is a marked tendency to hold that this duty is one which cannot be delegated; that it is to see that care is taken by whomsoever the task of inspection or repairing or constructing the premises is entrusted to, that it shall contain no hidden defect. *Mulchy v. Congregation*, 125 Mass., 87; *Stevens v. Company*, 73 N. H., 159.

duty of care is predicated upon the ability of the one to afford protection and the helpless inability of the other to protect himself; and his consequent necessary dependence and reliance upon his associates' care. Second, these duties usually, though perhaps not universally, exhibit that characteristic incident of the earlier positive duties—the requirement of something more than mere personal good conduct, a liability dependent upon the non-performance of the obligation to whatever extent it may exist.¹⁹

¹⁹ It may, however, be said, that the tendency of modern legal thought is to mitigate the rigor of these positive duties. The earliest duties appear to have been quite as absolute as modern contract obligations. Those attached to the earliest recognized public employments such as inn-keeper and carriers must be performed unless prevented by some force overpowering in its nature, such as the act of God or the King's enemies. Just as the tendency has been to restrict by legislation or to allow the restriction by the agreement of the parties of these stringent duties, so, in the newer relations, the tendency has been to allow him upon whom the duty is laid to absolve himself by showing that all care has been taken by whomsoever the performance of the duty has been entrusted to, to procure its proper performance. So, the duty annexed to such new relation is not so much to make the premises or business safe as to answer that care has been taken to secure safety. There also appears a reluctance to extend even this duty to all situations where a consistent logical application of the underlying principles would seem to require it.

It is difficult to see any logical distinction between the facts in the case of *Francis v. Cockrell*, L. R. 5, Q. B. 184, 501, where it was held that the stewards of a race meeting were liable for the injuries received by a ticket holder through the fall of a grandstand, though it had been constructed by an admittedly competent independent contractor, and the stewards themselves were in no fault, and in the case of *Searle v. Laverick*, L. R. 9, Q. B. 122, where it was held that a livery stable keeper was not liable to a customer whose carriage was destroyed by the fall of a coach-house erected upon his premises by a competent independent contractor employed by him. The reason given, that in the average case livery men rent their premises and therefore a customer can only expect of them careful selection and inspection of the premises in which they do business, seems unsatisfactory. For in this case it was constructed at the instance of the defendant upon his own premises expressly for use as a coach-house, and there would seem no good reason why general conditions should control, when in fact it appears that the actual conditions are exceptional. There would seem to be no greater ability on the part of the stewards than on that of the liveryman to secure a proper structure; nor would the public at a race meeting have greater reason to expect that the stewards would personally erect a grandstand than a customer that a stablekeeper would personally build his own stable. The real effect of the two decisions seems to be that the English courts are not prepared to recognize this stringent

As to the first, it will be found that this duty, like all other positive duties, arises only where the one party, having exclusive control of the cause of harm, is able to afford protection and the other, being by the very nature of the relation prevented from protecting himself, must look solely for his safety to his associate. And here it is to be borne in mind that the common law requires impossibilities of no man. It does not require care incompatible with the proper exercise of the business conducted.²⁰ Nor does it ask that precaution shall be taken to provide against merely possible but unusual and improbable mischances.²¹ These duties, being both abnormal and onerous, arise only where necessary for the protection of those unable to protect themselves, and extends no further than to secure protection against probable dangers wholly out of the control of such other. Where the relation is wholly voluntary on both sides, even if beneficial to him who offers it, nothing more can be asked than a full disclosure of the true conditions under which it is to be maintained. The other may protect himself, without foregoing the exercise of any legal right, by refusing to enter the relation or by withdrawing from it.

In none of these relations is the one party made the guardian of the general well-being of the other. The duty extends only to take care as to those things which from the very nature of the relation must be in the exclusive power and control of the defendant, and as to which the plaintiff

liability, practically that which a carrier owes to its passengers, save where the public are for the defendant's purposes induced to trust their persons to his care, as a passenger entrusts his safety to his carrier, and where some temporary structure is erected for immediate public use.

²⁰ As was said by Lord Holt in his celebrated opinion in *Coggs v. Bernard*, 2 Lord Raymond, 717-719, in which for the first time an attempt was made to systematize the English law dealing with that conspicuous voluntary relation of bailor and bailee, and in which much of the civil law learning was imported into the body of common law, "it would be unreasonable to charge" a bailiff or factor "with a trust further than the nature of the case puts it in his power to perform."

²¹ See *Stager v. Troy Laundry Co.*, 38 Oregon, 480; *infra*, p. 240, note 37.

must look for his safety solely to him. Even a carrier owes no duty to its passenger to protect him from all injuries or to remove him from every perilous situation into which he may fall while en route, nor to care for him if injured by a cause unconnected with the means of transportation.²² While it is bound to take care to operate its business so as to not to expose its passengers unnecessarily to dangers of which it is aware whether proceeding from the acts of the company itself, or of its patrons²³ or even of strangers;²⁴ this is because the passenger, by placing himself in the charge of the company, confined by the very necessities of the transportation to its car, and being in effect imprisoned therein has no power to avoid such dangers, and must look to his carrier to keep him out of range of them. But the carrier owes no duty to provide medical attendance to an ill passenger^{24a} or clothes to ill-clothed, or food to one who

²² In *Prosper v. R. R.*, 67 Atl. Rep., 522 (R. I. 1907), it was held that a carrier's duty to its passenger does not include an obligation to supply them with shelter when exposed to cold by reason of an unavoidable delay in transportation, and that it was not liable to a passenger in a car stalled for many hours by the snow or a failure of its conductor to obtain for her and her infant child shelter in some adjacent farmhouse.

²³ *Kennedy v. R. R.*, 32 Pa. Sup. Ct., 623.

²⁴ *Dufurr v. R. R.*, 75 Vt., 165.

^{24a} See *R. R. v. Statham*, 42 Miss., 607, pp. 612, 613. If passengers are when they embark "through illness incapable of taking care of themselves, they should have attendants along to care for them." See, also, *B. & O. R. R. v. Woodward*, 41 Md., 268, p. 290. In *A., T. & S. F. R. R. v. Weber*, 33 Kans., 543, it is intimated that if a passenger becomes sick while en route the carrier owes him a duty to remove him from its train and to care for him until he can be turned over to the public authorities charged with the care of the helpless sick. This, however, was in the particular case, merely dictum, the actual decision being that while the carrier has a right to eject a passenger so drunk as to be offensive to his fellow-passenger, in so doing it must not expose him to unnecessary peril by leaving him helpless in a dangerous place, or exposed to the elements till the proper public officers arrive. In many respects the case resembles *Fluteau v. Dupue*, 111 N. W., 1, and *Weymire v. Wolfe*, 52 Iowa, 533, where it was held that neither an ill guest nor a drunken patron should be sent helpless out into the cold. If a passenger is palpably ill, or even drunk, the company is bound to exercise in its operation care proportionate to his helplessness to protect him from injury therefrom, *Wheeler v. R. R.*, 70 N. H., 607, and it may well be that even if the passenger is not offensive to his fellow-passen-

improvidently starts upon a long journey insufficiently supplied, all these matters being usually within the power of the passenger. A striking instance of this principle is the divergent liability for the loss of a passenger's baggage turned over to the company's exclusive care, where its liability is practically that of insurer, and for the loss of baggage retained in the passenger's personal custody, which attaches only where some defect in the company's plant or operations has caused injury to it. So, it has been held that a railroad company is not bound to stop its train to recover a bag of jewels retained in a passenger's custody which falls from a window of its car without fault on its part.²⁵

This principle appears perhaps most strikingly in the duties attaching to the relation of master and servant. This relation is voluntary on both sides and is for the benefit of both. The master's duty extends no further than to take care not to expose the servant to unnecessary risks from sources over which the master having exclusive control has the sole ability to protect the servant, and, from which the servant, being ignorant of the true condition of affairs, is unable to protect himself by withdrawing from the service.²⁶

He must provide and prepare as to those matters within his exclusive control a business as safe as it appears to be. The master's duty in this respect is usually said to comprise only certain definite duties, these (1) of supplying safe tools and appliances; (2) a safe place to work; (3) a sufficiency of not obviously incompetent fellow-servants; (4) a safe system of rules and regulations where the complicated nature of the business makes it necessary for

gers, the company may still, to relieve itself from this burden, which may well be one incompatible with the proper operation of its business, remove him from its train. But if they do so, they are of course bound to exercise care not to cause him unnecessary peril or exposure.

²⁵ *Henderson v. R. R.*, 122 U. S., 61.

²⁶ We must keep constantly in mind one principle peculiar to this relation. The business being one operated for the joint benefit of both master and servant, the master is not responsible for its negligent

the servant's protection, and (5) in many jurisdictions some by common law and some by statute, efficient superintendence. These, however, are but the more usual instances of the application of the general principle which requires from the one, able to afford it, protection to the other incompetent to protect himself. These are the usual things over which the master has the exclusive control and the sole power to make safe; the servant if ignorant of the defects therein being unable to protect himself by withdrawing from the employment, and by the very nature of the employment being forced to take and use what the master provides him and so to look solely to his master's care in these particulars for his safety.

It would seem therefore to be erroneous to regard these enumerated duties as the sole duties owed by the master, and to refuse to recognize the existence of any further duty unless it can be brought by some strained reasoning within the terms of one of them. On the contrary, it would appear that wherever, from the peculiar nature of the business the servant must rely exclusively for his safety upon the master's care, in any particular, even though it falls outside of these well defined duties, there does exist a duty on the master's part to take care for the servant's safety in these respects. So, while it is not normally the master's duty to furnish food or clothing to a servant, or to render him medical assistance and while,

operation by those to whom he entrusts it in the absence of personal misconduct on his own part. A servant injured by the negligence of a fellow servant in the operation and not the preparation of a business has, therefore, no right of action against his master. But the preparation of the business being wholly within the power of the master, he is bound to see to it that care is taken to provide a business as least as safe as it appears to be. This obligation has also this anomalous feature among positive duties. While it cannot be delegated to a servant of the master, or to a special branch of his business which is devoted to its performance, so as to escape liability for its non-performance, it may be entrusted to a competent independent contractor where the thing to be provided as a matter of preparation of a safe business is one which is ordinarily left by the average man to independent contractors.

in general, even a contract to do so will not give the servant the right of action for injuries sustained through the lack thereof; this is only because there is nothing in the nature of the ordinary employment to prevent the servant from being just as capable, save for the difference in financial position (which the common law regards as of *no* moment) to supply himself as the master is to supply him. But, it may well be that the nature of some particular employment may require the servant to trust himself in these particulars to his master's care just as in general he must rely upon it in respect to the character of the tools which he uses. Out of just such a situation has arisen the duty recognized in the maritime law as resting upon a vessel and its owner to provide sufficient food, and in America at least, medical attendance to its seamen.²⁷ And the reason given is that the very nature of their employment causes them to be during the voyage entirely under the control and at the mercy of the master of the vessel, and to visit foreign ports where if cast adrift ill and without resources and very possibly ignorant of the language, they would be utterly helpless, while the master is able to cause the sailor to be properly cared for. There appears to be recognized a further duty on the part of a ship to its sailors, to make all reasonable efforts to rescue them if they fall overboard from any cause whatsoever.²⁸ And it would appear that this is a not improper extension of the ship's duty. The very nature of the employment is one subjecting the sailor to grave risk of just such peril, and his helplessness and the master's ability to protect him, is manifest.

Now, while the maritime law in many respects differs from the common law, and the existence of a duty recognized by the one is not an authority for its existence in

²⁷ So, in *Scarf v. Metcalf*, 107 N. Y., 211, it was held that an action lay by a sailor against the owner of his ship where his injuries had been greatly aggravated by the captain's failure to provide proper medical attendance.

²⁸ See Field, J., in charging the jury in *U. S. v. Knowles*, 4 Sawyer (U. S.), 517.

the other, none the less that where the nature of the employment though on land is similar in its attributes to that of a sailor where there exists the same isolation, the same expectable inability on the part of the servant to provide for himself, the same complete dependence upon the care of the master and the same risk of illness or injury inherent in the very nature of the employment it would seem that the general principles governing the duty of a master to his servant (of which the duty to provide safe tools, etc., are but instances) demands that the common law should equally with the maritime law recognize the duty of a master to feed, clothe, and provide his servant with necessary medical attendance. And it is submitted that the cases tend to support under appropriate circumstances the existence of such a duty, at least to the extent of supplying proper food and lodging. While it is held in *R. v. Smith*,²⁹ that a master is not guilty of manslaughter in failing to supply food and lodging to a servant who was *sui juris* and was free to leave the master's house and was not coerced by threats or ill treatment to remain, it is otherwise where the servant is so reduced in mind and body as to be within the entire control of the master, or where the servant, being of tender age, is equally under the master's dominion.³⁰ And one who imprisons another, though legally, is bound to provide his prisoner with necessities.³¹

So, where the nature of the employment is for any cause, as for instance its isolation, its distance from any place where the servant can be expected to be able to supply himself, is such that it is evident that he must look solely to his master for food or lodging many cases recognize the master's duty to provide them for him.³²

²⁹ 10 Cox, C. C., 82.

³⁰ *R. v. Ridley*, 2 Campb., 645.

³¹ *R. v. Edwards*, 8 C. & P., 611.

³² In *Shoemaker v. R. R.*, 46 Minn., 39, it was held that a railroad company having sent a gang of men out to an isolated point in very cold weather was bound to provide them with transportation to some point where they could provide food and shelter for themselves. So,

The duty of a master to supply medical or surgical aid seems to be even more doubtful.³³ In *Wennall v. Abney*,³⁴ it was laid down broadly that a master is not, in the absence of contract, bound to supply medical attendance for even his domestic servant, the case was one where an action was brought against the master to recover for medical attendance furnished the servant. One reason given for denying the master's liability was that it would be highly and unnecessarily onerous to require one, who was obliged by the necessities of his trade to hire a servant for a very small wage, to be subject to a contingent liability, entirely beyond his ability to bear, for the cost of effecting a cure of some serious disorder entailing large expense.

in *Clifford v. R. R.*, 9 Col., 333, it was held that where a man was employed to work at an isolated point, the master was liable in an action of tort for a failure to supply suitable food and lodging. True, the contract specified that the master engaged to supply these, but had the servant been able to supply himself and not wholly dependent upon his master, in view of the nature of his employment, even in an action upon the contract, he could not have recovered for more than the costs to which he had been put in procuring them. The contract, in a word, merely showed that the servant was entitled to rely upon his master in these particulars. So, in *Hyatt v. R. R.*, 19 Mo. App., 287, it was held that where a gang of men had been sent out to shove snow drifts, and one of them was frozen, owing to a failure to send out a heated car as a shelter, as the superintendent had promised, a recovery might be had. The superintendent's promise did not amount to an actual contract; it was at best a mere assurance that the car would be sent. It gave the servant reason to work on, relying upon that his master would afford him the protection necessary to make his work safe, and removed all ground for claiming that the servant had assumed the risk, knowing that he must look out for himself. The case is, therefore, in line with those where a servant, though knowing that a tool or appliance is defective, continues to use it upon his master's assurance that it will be repaired. In *King v. R. R.*, 23 R. I., 583, it was, however, held that a railroad company was not liable to provide sufficient clothing to one whom it sent out to shovel snow at a point remote from human habitation. Here, however, the servant knowing the work he was expected to do, the place where he was expected to perform it, and the severe weather then prevailing, could have protected himself. He knew the conditions and could have dressed himself accordingly, or if he had not the means to afford proper clothing, he could have refused to work, or insisted upon his master supplying him with the necessary clothing.

³³ Compare as to this the doubt as to any such duty as arising out of family relationship. Ante, p.

³⁴ 3 Bos. & P., 247.

Here, however, the servant who was injured in his master's service was taken to his mother's house and there treated by the plaintiff and there was no doubt but that had the mother been unable to care for her son she could have obtained medical attendance from the parish. The servant was therefore neither by the very nature of his employment nor under the circumstances of the particular accident necessarily forced to look for such aid to his master alone, who was in fact not even present when the injury was received. When, however, the servant is employed to do hazardous work in a place or under circumstances making it evident that he must look solely to his master for such immediate and urgently required care and attention as can only be rendered on the spot, it is held in *Early v. R. R.*³⁵ and *Shaw v. R. R.*,³⁶ that it is the duty of the master's representative upon the spot to make a *bona fide* effort to relieve him. This duty so closely akin to that owed by a ship to its seaman and existing where the employment is closely analogous in its incidents to that of a sailor on a voyage, arises only out of absolute necessity. It would not exist when as in *Wennall v. Abney*, the servant though injured could provide medical aid for himself or could turn to relief to the public authorities primarily charged with the care of the indigent sick. It would arise out of the emergency and expire with it. It would not require the master to support, care for and provide medical attendance for his servant till cured. As it would only bind the master only to render the servant such immediate aid as was possible on the spot and transportation to a point where he could be properly cared for, either by himself, or by the public; nor would it require that a surgeon should be maintained to treat such cases as they arose;³⁷

³⁵ 151 Ind., 73.

³⁶ 114 N. W. (Minn., 1907), 85.

³⁷ *Stayer v. Troy Laundry Co.*, 38 Oregon, 480. "It is unusual to anticipate accident and provide for the most speedy relief when such an exigency arises." The master need do no more than provide for the normal and expectable; he need not anticipate and provide for the merely possible but improbable.

all that would be demanded would be such humane attention, such "first aid to the injured" as could be expected from the master or his representative upon the spot.

In *King v. R. R.*,³⁸ it was, however, held that while the conduct of a conductor of defendant in refusing to carry home an employee whose feet had become frozen while shoveling snow at an isolated point on its line, was, morally speaking, highly reprehensible in a gross act of inhumanity, the company owed no legal duty to him to transport him to a point where his injuries could receive attention.

Here it is necessary to discriminate between duties and privileges. Between the right under the certain circumstances to act in a particular way, and the duty to do so. No doubt a father may justify force in defence of his son; a servant in defence of his master; a husband in defence of his wife, and *vice versa*. But while he is privileged to interfere for his son's or master's or wife's protection, he is under no legal duty to do so. No action has ever been maintained against the cowardly servant, father, or husband, who ran away when his master, son, or wife was attacked. So, while it is constantly held that a man may justify taking very considerable risks in order to save human life,³⁹ none the less there appears to be no legal liability if he fails to do so.⁴⁰

It is important to bear this distinction in mind in considering another class of cases, those in which it is held that a corporate agent may bind its principal for expenses incurred in aiding servants patrons, or strangers, who have been injured by the innocent operation of its business. The scope of a servant or agent's employment is by no means limited to the performance of those acts which the employer is legally bound to do. Of course, if the act is one which the employer is bound to have done, it will be inferred that a servant performing it is authorized to do so.

³⁸ 23 R. I., 583.

³⁹ *Eckert v. R. R.*, 43 N. Y., 502; *Corbin v. City*, 195 Pa., 461.

⁴⁰ See Carpenter, C. J., *Buch v. Armory Co.*, 69 N. H., 257.

But there are many things which are purely discretionary with the master, but which may yet well fall within the scope of the servant's employment if they tend to advance the master's interests. It by no means follows, therefore, that because a railroad is held liable to a physician employed by its conductor or other official representative to render medical assistance to persons injured by its operation that the court is prepared to recognize that it is the company's duty to render such services.

So, while it is held in England that a general manager has the power to bind a railway for its surgical attendance furnished persons injured upon its lines,⁴¹ and that an inspector whose duty it is to care for persons injured, by its operations may pledge the credit of the company for lodgings furnished to such persons at an inn,⁴² no English case can be found holding the railway liable for a failure to supply either medical attendance or lodgings to those innocently injured by its operations. So, while it has been held in Kansas that a division superintendent has authority to provide medical attendance to a servant⁴³ though not to provide similar services for a passenger⁴⁴ the existence of any duty to care for those whom one may innocently

⁴¹ *Walker v. R. R.*, L. R., 2 Ex., 228.

⁴² *Langan v. R. R.*, 26 L. T. N. S., 577.

⁴³ *R. R. v. Winterbotham*, 52 Kan., 433.

⁴⁴ *R. R. v. Batty*, 35 Kan., 265. It is difficult to see the force of the distinction drawn between aid to a servant and to a passenger. The reason given is that the master has an interest in preserving the health of a skilled employee, but they have no similar interest in the health of a passenger. This, however, seems to overlook the interest which the company possesses in minimizing the injuries of its injured passengers, and so reducing the amount of the damages recoverable if it turn out that the railroad has been delinquent. Since the company's representative must act at once, he can hardly be asked to determine on the spot whether the accident renders the company liable or not, and he should be, therefore, allowed a certain latitude of discretion as to whether it is to the company's interest to aid the passenger. And the company's liability should not be allowed to depend upon whether he turned out to be right or wrong in his judgment. It would appear that a railroad is not responsible for the acts of its train crew in their humane effort to relieve the sufferings of an injured trespasser. The company owing no duty of relief to trespassers, acts of the crew are done out of purely personal

injure, or to remove them from a perilous situation in which one has innocently placed them, is expressly denied in *Cappier v. R. R.*⁴⁵

On the whole, it may be said that duties to take positive action for the benefit and protection of others attach only to certain relations; and are imposed only when absolutely necessary for the protection of others and only to the extent generally necessary to afford them protection. Save where the state has by legislative enactment imposed such obligations, they do not exist, unless there be some family relation; tenure or occupancy of real property, or the voluntary act of consciously entering into some relationship to which such duties are attached because necessary for the protection of one's associates. Even in the case of family relationship there is present the will of the citizen to become a husband or father, so that even here the relation is, in the last analysis, the creature of voluntary action on his part. The occupancy of real estate is, save perhaps in the case where it comes into one's possession by inheritance, a conscious voluntary act.⁴⁶ It is not too much to say therefore that saving the case of an inherited estate, if indeed this be an exception, no man can be saddled with a burden of positive action without some voluntary act on his part which renders him subject thereto. In addition it would appear that save in the case of family relations, where the interest of the state to avoid being unduly burdened with the support of those whose relations are able to care for them naturally leads to the burden of the support of the members of a family being placed upon its head, no obligation beyond that of good faith and fair dealing is laid upon any individual

humanity and have no tendency to further the company's interests. So, in *Ollet v. the R. R.*, 201 Pa., 361, it was held that where a train crew had taken a youthful trespasser against his protest to a hospital the company was not liable to him in an action of false imprisonment.

⁴⁵ 66 Kan., 649.

⁴⁶ It is perhaps possible even to presume a willingness to take the benefit of an inheritance; at all events the estate at some period has come into the line of descent by the voluntary act of some ancestor.

unless he voluntarily occupies a relation materially beneficial to him. Finally it may be said that these obligations only attach where the one party, having exclusive control of a condition, has the entire power to prevent harm arising from it, and where the other, from the very nature of the relation, must be altogether helpless and incapable of protecting himself, and so is forced to rely implicitly upon the care of his associate for his safety.

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(To be Continued.)